4-64

(12)

No. 224

Office - Supreme Court, U. S.
FILED
JUN 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

RUTH NAOMI URSETH,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit
and

BRIEF IN SUPPORT.

J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Counsel for Petitioner.

LEAHY, WALTHER & HECKER,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1–9
Statement of matter involved	1
The principal questions involved	7
Reasons for granting the writ	8
Prayer for writ	9
Brief in support of petition	10–17
Opinion	10
Jurisdiction	10
Statement of the case	12
Specification of error	12
Summary of argument	13
Argument	14
Conclusion	17

Cases Cited.

Berryman v. Southern Surety Co., 285 Mo. 379, 227 S. W. 96 ..... 7, 11, 16

Block v. U. S. etc. Co., 316 Mo. 278, l. c. 294, 290 S. W. 429 6

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 60 U. S. Sup. Ct. Rep. 201 11

Dobyns v. Bay State etc. Assn., 144 Mo. 95, 45 S. W. 1107 ..... 7, 11, 16

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817 ..... 11, 13, 14

Fidelity Union Trust Co. v. Field, 311 U. S. ..., 61 Sup. Ct. Rep. 179 (Dec. 9, 1940) 11

Gannon v. Gas Co., 145 Mo. 502, 47 S. W. 968.....5, 11, 14
Gibson v. Ins. Co., 181 Mo. App. 302, l. c. 310, 168 S. W. 818 .....6, 11, 12, 16
Hudson et al. v. Munnier, 304 U. S. 397, 58 Sup. Ct. Rep. 954 11
Lafferty v. K. C. Casualty Co., 287 Mo. 555, 229 S. W. 750 .....5, 11, 12, 14
Mutual Benefit Health & Accident Assurance Co. v. Bowman, 58 Sup. Ct. Rep. 1056, 304 U. S. 549 (Sup. Ct. reversed Ct. of App. [C. C. A. 8]) 11
National City Bk. v. Mo. State Life Ins. Co., 332 Mo. 182, 57 S. W. (2d) 1066.....6, 11
N. Y. Life Ins. Co. v. Jackson, 304 U. S. 263, 58 Sup. Ct. Rep. 871 11
Rosenthal v. N. Y. Life Ins. Co., 304 U. S. 263, 58 Sup. Ct. Rep. 874 11
Ruhlin et al. v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. Rep. 860..... 11
Shaw v. American Ins. Union, 33 S. W. (2d) 1052 (St. L. Ct. App.) 6, 11, 15
Stoner v. N. Y. Life Ins. Co., 61 Sup. Ct. Rep. 336.... 8
West v. Amer. Tel. & Tel. Co., 311 U. S. ..., 61 Sup Ct. Rep. 176 11

Statutes Cited.

Judicial Code, Sec. 240 (a), amended Feb. 13, 1925 (Chap. 229, Sec. 1), 43 Stat. 438; Sec. 1217, U. S. Compiled Statute Cum. Supp. 1925 (28 U. S. C. A. 347) 10
United States Code, Title 28, Para. 723b.....9, 11

Textbook Cited.

Cooley's Briefs, Vol. 1, page 641..... 13

IN THE

SUPREME COURT OF THE UNITED STATES.

RUTH NAOMI URSETH,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

The petitioner, Ruth Naomi Urseth, an individual, respectfully shows to this Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit on a policy of life insurance in the sum of $5,000.00, **issued** by the Sun Life Assurance Company, in the State of Missouri, on **February 20**, 1936, for a term of five years, beginning on February 15, 1936, and expiring on February 15, 1941. The date of issue, **February 20th**, presupposes a payment on February 15th, the policy reciting that the premium in the amount of $15.05 is to be paid on February 15, 1936, and thereafter is to be paid quarterly. The policy contains a provision that it shall not

take effect until the first premium is actually paid during the life and good health of the assured. The policy was delivered to the assured on February 24, 1936. On April 15, 1936, the assured was killed in an automobile accident.

The amended petition is in conventional form.

The company defended on the theory that the assured worked for the company as an agent, and that it was his duty, as agent, to deliver the policy to himself as an assured and to collect the premium. The position of plaintiff below (petitioner here) was that there was an unconditional delivery, and that there was an extension of credit. A so-called memorandum which was alleged by the company to have been placed with the policy in the company mail box of the assured, who was an agent of the company, at the time of the issuance and delivery of the policy shows that it was intended for him as an assured, since it is addressed to Mr. Urseth and refers to "Your policy 1493-954" (R. p. 78). At the time of the transaction in question, policies and routine work in connection with same were taken care of by Miss Hazel Ash (R. p. 61). She testified that it was her habit to place the policies in the boxes of the agents, although in a deposition previously given she could not recall whether she handed the policy to Mr. Urseth or placed it in his box. It was her practice to wrap around the policy a printed set of rules, then place them in the box of the agent for delivery to the assured. Such rules were only intended for the agent (R. p. 64). No receipt was taken from Mr. Urseth showing the policy was to be delivered for the purpose of inspection, or any other purpose other than unconditionally. The conditional receipt which would ordinarily be taken if a conditional delivery was intended was not filled out. Nobody ever asked the assured for the premium (R. p. 63). Miss Ash testified she sent a letter, designated as Defendant's Exhibit 7, and

explained, "That form letter is notifying him that his policy is no longer in effect and recalling the policy for cancellation" (R. p. 88). The record, which was kept on a card, marked "Defendant's Exhibit 6" (R. p. 88), showed that the policy in question was canceled April 22, 1936, seven days after the death of the assured (R. p. 93). The testimony showed that when agents of the company bought policies they were considered as any other assured, and, if there was a conditional delivery, they were required to sign a conditional receipt. Urseth was employed under a written contract of employment, which is set out in part (R. p. 76). He was to receive advances of $25.00 per week, although the manager (R. p. 51) stated that it was optional with the manager whether such advancements were made. Advances of $25.00 each were made to Urseth under dates of February 4th, 12th and 18th. Two of these advances were made subsequent to the time that Urseth was examined by the company's doctor on February 11th. The date of the application was February 15th. The premium was due February 15, 1936, as shown by the card record (R. p. 88). Urseth's contract of employment was canceled March 23rd. The assured would have received a commission of 40 per cent, and the balance due the company would have been $9.00. There was a question raised whether the assured was to pay for the premium out of advances, or his salary as it was designated. The evidence showed that after the death of Urseth there was a conversation between the manager for the company and counsel for the widow. The manager stated the assured was to pay premiums out of advancements, but did not do so (R. p. 96). The company had charge accounts with some of its agents (R. p. 54). It sold policies to some of its agents and charged them to the accounts of such agents.

The manager knew of the impecunious circumstances of Mr. Urseth at the time of his application for insurance,

and yet the policy was issued and delivered. All of the agents of the company had authority to deliver policies and collect premiums (R. p. 58). Urseth did not refuse to have the premiums deducted from the money as it was advanced to him; there was no demand ever made on him to take the premiums out of his advances (R. p. 58). The manager admitted (R. p. 52) that when the policy was issued on the 20th the company knew the premium had not been paid to the company; nevertheless, the policy was delivered to the assured (R. p. 53). It was the practice of the company to offset accounts of the agents against the accounts of the company. Some of the agents had what were called advance accounts, which were accounts under which the agents owed the company money. The manager testified (R. p. 57) that he did not instruct anybody to take a conditional receipt in this particular case. He learned that the policy was delivered to Urseth about the 26th of February, two days after the date of delivery. From that time until the 23rd of March, when he discharged Urseth, he never instructed anybody to take a receipt from Urseth. There had been a letter that had gone out telling Urseth to pay the premium (R. p. 56).

The company claims to have written a letter, dated February 8, 1936, marked "Defendant's Exhibit 4" (R. p. 80), to the wife of the assured, which petitioner claims she never received. The company claims the date of the letter is a mistake. The excuse offered by the company is that the company did not know the address of Mr. Urseth, although the evidence showed she was never separated nor estranged from her husband (R. p. 96). If there was such a letter, dated February 8, 1936, written, and through error misdated, it is to be noted that the reason given in the letter requesting the return of the policy was not that it was conditionally delivered, but that "the quarterly premium has not been paid."

In terminating the employment by a letter dated March 23, 1936, the company used the following phraseology:

> "In terminating said Agreement, we do so without prejudice in respect of any indebtedness due or to become due the Company for loans, advances or otherwise."

When the policy was turned over to petitioner by her husband toward the end of February, 1936, there was nothing wrapped around it (R. p. 96).

At the close of all the evidence the Court took the view that the policy had never gone into effect because the policy contained the provision, "This policy shall not take effect until the first premium shall have been actually paid during the life and good health of the assured," and because the premium was not paid. The Court sustained a motion for a directed verdict for the company (R. p. 99).

A motion for new trial was filed (R. p. 100) and overruled (R. p. 101). The case was duly appealed to the United States Circuit Court of Appeals, which affirmed the judgment below.

In the Court of Appeals the petitioner took the position that the federal courts are bound to follow the Missouri substantive rules of law which govern this case, to wit:

I.

Where a prima facie case is made based on a policy of insurance the question of delivery is an affirmative defense and the weight of evidence to sustain it is a matter for the jury which the Court cannot lawfully usurp.

Lafferty v. K. C. Casualty Co., 287 Mo. 555, 229 S. W. 750;
Gannon v. Gas Co., 145 Mo. 502, 47 S. W. 968.

II.

Where the agent of the insurance company is also an applicant for insurance, a delivery of the policy to the agent is a delivery to the insured.

Gibson v. Ins. Co., 181 Mo. App. 302, l. c. 310, 168 S. W. 818.

III.

To be conclusive, "documentary evidence," although including every form of writing, must be an instrument or record having legal efficacy and a person to be bound must be a party thereto or vouch for, or be estopped to deny its truth.

Shaw v. American Ins. Union, 33 S. W. (2d) 1052 (St. L. Ct. App.).

(The Court of Appeals for the Eighth Circuit in violation of this Missouri substantive rule of law holds [R. p. 116]—"the positive testimony of the defendant's witnesses, however, in connection with the established practice in such cases, and the carbon copy of the memorandum contained in defendant's file, could leave no rational doubt on that point for the jury to settle.")

IV.

Under the Missouri rule the delivery of a policy of life insurance to an insured without the payment of the initial premium constitutes an extension of credit, irrespective of provisions in the policy to the contrary.

National City Bk. v. Mo. State Life Ins. Co., 332 Mo. 182, 57 S. W. (2d) 1066;
Block v. U. S. etc. Co., 316 Mo. 278, l. c. 294, 290 S. W. 429.

V.

Under the Missouri rule the recital in the policy that a premium has been paid cannot be contradicted. Here

the recital that the premium was to be paid on the 15th day of February, the issue of the policy on the 20th day of February and the delivery of the policy on the 24th, constituted an acknowledgment of the receipt of the premium prior to the date of the issuance, which cannot be contradicted.

Dobyns v. Bay State etc., Assn., 144 Mo. 95, 45 S. W. 1107;

Berryman v. Southern Surety Co., 285 Mo. 379, 227 S. W. 96.

THE PRINCIPAL QUESTIONS INVOLVED ARE:

I.

Are the federal courts bound to follow the Missouri rules of substantive law holding:

1. Where a prima facie case is made on an insurance policy, the defense of nonpayment of the premium or the defense of nondelivery of the policy or conditional delivery is a question of fact and the weight of the evidence is for the jury which the Court cannot lawfully usurp.

2. The delivery of a policy to an applicant who is also an agent of the company is a delivery to the assured.

3. Documentary evidence to be conclusive must be an instrument or record having legal efficacy and a person to be bound must be a party thereto or vouch for, or be estopped to deny its truth.

4. The recital in a policy that the premium has been paid or the equivalent thereto cannot be contradicted in a suit on the policy.

5. The unconditional delivery of a policy to the insured without payment of the initial premium is an extension of credit and a waiver of prepayment irrespective of provisions in the policy to the contrary.

REASONS FOR GRANTING THE WRIT.

(a) The decision of the Court of Appeals is in conflict with the case of **Stoner v. New York Life Ins. Co.**, 61 Sup. Ct. 336, reversing the Court of Appeals for the Eighth Circuit in the case because it refused to follow the Kansas City Court of Appeals, which held that there was a jury question as to whether the disability clauses in a policy offered a question of fact. So in the case at bar the Court of Appeals has usurped the function of the jury.

(b) The decision of the Court of Appeals sets a bad precedent of great importance because of the failure of the said Court to follow applicable Missouri decisions holding:

I.

That the burden of proof is on the Insurance Company and the credibility of the witnesses is for the jury, after a prima facie case is made.

The Court cannot usurp the functions of the jury.

II.

The delivery of a policy by a company to an agent who is also the assured is a delivery to the assured.

III.

"Documentary evidence," although including every form of writing, must be an instrument or record having legal efficacy, and a person, to be bound thereby, must be a party thereto or vouch for or be estopped to deny its truth.

IV.

The delivery of the policy to the assured without payment of the initial premium constitutes an extension of credit.

V.

The recital in the policy that the premium was to be paid on the 15th day of February, the subsequent issuance

of the policy on the 20th of February was equivalent to a recital of payment.

VI.

The great importance of the rules of the state courts as applicable to the federal courts is apparent, and the failure of the federal court to follow the state court rules also constitutes a failure to follow the United States Code, Title 28, Para. 723b, providing that the rules in civil actions at law shall neither abridge, enlarge nor modify the substantive rights of any litigant. The burden of proof rule and the state court rules governing prima facie cases are rules of substantive law which the federal courts are bound to follow.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case styled Ruth Naomi Urseth v. Sun Life Assurance Company of Canada, No. 11,854, to the end that the cause may be reviewed by this Court and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other relief as to this Court may seem proper.

RUTH NAOMI URSETH,

By J. L. LONDON,
1105 Commerce Building,
St. Louis, Missouri,
Counsel for Petitioner.

LEAHY, WALTHER & HECKER,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.